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No. 956

In the Supreme Court of the United States

OCTOBER TERM, 1955

A. CRAWFORD GREENE and WELLS FARGO BANK & UNION TRUST CO., a corporation, as Executors Under the Last Will and Testament of Gordon Blanding, Deceased, and as Trustees of the Trusts Created Under said Last Will and Testament and by Decree of Final Distribution of The Estate of Said Decedent Dated December 14, 1948, PETITIONERS

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1-18) is reported at 171 F. Supp. 459.

JURISDICTION

The judgment of the Court of Claims was entered on March 4, 1959. (Pet. App. 1.) The petition for a writ of certiorari was filed on May 28, 1959. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1255.

QUESTION PRESENTED

Whether this Court's decision in *Murdock* v. *Ward*, 178 U.S. 139, holding that tax-exempt United States bonds are properly includible in a decedent's gross estate for purposes of the federal inheritance tax, should be overruled.

STATUTE INVOLVED

Internal Revenue Code of 1939:

> SEC. 811. GROSS ESTATE.
>
> The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—
>
> (a) *Decedent's Interest.*—To the extent of the interest therein of the decedent at the time of his death;
>
> * * * *
>
> (26 U.S.C. 1952 ed., Sec. 811.)

STATEMENT

The undisputed facts are set forth in the findings of fact of the Court of Claims (Pet. App. 11-18) and may be summarized as follows:

Petitioners are the co-executors and testamentary trustees of the estate of Gordon Blanding, who died on September 11, 1945. Among the assets of the decedent were certain United States 3% Panama Canal loan bonds dated June 1, 1911, and due June 1, 1961. (Pet. App. 11.) These bonds were issued pursuant to the provisions of Section 39 of the Act of August 5, 1909, as supplemented by the Act of February 4, 1910 (Appendix, *infra*, pp. 9-10), which provides in relevant part as follows:

> * * * the bonds herein authorized shall be exempt from all taxes or duties of the United States, as well as from taxation in any form by or under State, municipal, or local authority * * *.

Each of the bonds, on its face, contained the following provision (Pet. App. 12):

> The principal and interest are exempt from all taxes or duties of the United States as well as from taxation in any form by or under State, Municipal or local authority.

During his lifetime (in 1939), the decedent made an irrevocable gift of $1,000,000 of par value of these bonds to his daughter and paid the federal gift tax thereon. (Pet. App. 17.)

Other of the bonds, in the amount of $1,432,600, were owned by the decedent at the date of his death and constituted a part of his estate. (Pet. App. 11.) However, petitioners, contending that the bonds were exempt from the federal estate tax by reason of the tax exemption clause, did not initially include their value in the decedent's gross estate. They did so

later, under protest, and paid the estate tax due thereon. (Pet. App. 12-13.) After a timely claim was denied by the Collector, this suit for refund was instituted. (Pet. App. 16.) The Court of Claims held for the United States. (Pet. App. 18.)

ARGUMENT

Whether the value of the Panama Canal bonds owned by the decedent is includible in his gross estate under Section 811(a) of the Internal Revenue Code of 1939 (*supra*, p. 2) depends upon whether the tax exemption clause of the 1909 statute which authorized the issuance of the bonds [1] extends to the federal estate tax. The clause, which exempts the "bonds * * * from all taxes or duties of the United States", is in substantially the same language as the exemption clause contained in an 1870 statute [2] considered by this Court in *Plummer* v. *Coler*, 178 U.S. 115, and *Murdock* v. *Ward*, 178 U.S. 139, cases involving State and Federal inheritance taxes. In those cases, this Court unequivocally held that the 1870 exemption clause did not confer an exemption from inheritance tax, because such a tax is imposed upon the right to receive the bonds rather than on the bonds themselves. The federal estate tax involved here is similarly a tax upon the *transfer* of property at death. See 1939 Code, Section 810, 26 U.S.C. 1952 ed., Section 810; *United States Trust Co.* v. *Helvering*, 307 U.S. 57. Petitioners, apparently conceding that *Murdock* is controlling here, assert that the decision

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[1] Section 39 of the Act of August 5, 1909, as supplemented by the Act of February 4, 1910, Appendix, *infra*, pp. 9-10.

[2] Act of July 14, 1870, c. 256, 16 Stat. 272, Section 1.

"is simply wrong" (Pet. 12) and "ought to be overruled" (Pet. 13).[3] We believe that the long-standing construction of the relevant statutory provisions should not now be overturned.

It is argued that in *Murdock* the Court failed to consider the legislative history of the 1870 statute, and that this history actually shows that Congress intended the bonds to be free of death duties.[4] (Pet. 6-10.) But, as both the opinion below (Pet. App. 5-6, 8) and petitioner's own discussion of the legislative history (Pet. 7-9) show, there was no persuasive legislative history, one way or the other, for the Court to consider. The history of the 1870 exemption clause involved in *Murdock* discloses no clear-cut intention in relation to the application of inheritance taxes, but reflects only a specific purpose to exempt from income taxation.[5]

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[3] It may be noted that the decedent-purchaser of the bonds, himself a lawyer, apparently did not believe he had contracted for exemption from transfer taxes, since he paid gift taxes on the value of other bonds of the same type without protest. The same is true of innumerable other taxpayers who have paid transfer taxes on tax-exempt bonds since the *Murdock* rule was established.

[4] There is concededly no helpful legislative history on the 1909 statute authorizing the Panama Canal bonds involved here. (Pet. App. 5.)

[5] While general statements that there would be exemption from all taxes were made on the floor (Pet. 8-9), it was also stated by three Senators that the only tax involved was the income tax. 41-2 Cong. Globe, Part 2, pp. 1591, 1878, 1879. Thus, Senator Sherman (reporting the measure) said that "The bonds of the United States cannot be subjected to national taxation except in one form, and that is the tax on income" (p. 1591); Senator Bayard, that "the

The history of later tax-exemption statutes, together with the decisions construing them, confirms the *Murdock* rule. *Murdock* was decided in 1900. The statute authorizing issuance of the Panama Canal bonds involved here was enacted in 1909. It cannot be assumed that, in enacting that statute, Congress was unaware of a decision as important as *Murdock*. Furthermore, the provisos in later statutes expressly excepting inheritance and estate taxes from the exemption were held to be merely statutory enactments of the *Murdock* rule. *Phipps* v. *Commissioner*, 91 F. 2d 627 (C.A. 10th), certiorari denied, 302 U.S. 742; *Hamersley* v. *United States*, 16 F. Supp. 768 (C.Cls.), certiorari denied, 300 U.S. 659, rehearing denied, 302 U.S. 774. Only where the courts have found plain, affirmative evidence that Congress intended to extend exemption to inheritance and estate taxes has such a claim been allowed. *Jandorf's Estate* v. *Commissioner*, 171 F. 2d 464 (C.A. 2d); *Pennsylvania Co. for Banking & Trusts* v. *United States*, 185 F. 2d 125 (C.A. 3d). *Jandorf's Estate*, upon which petitioners rely (Pet. 13), expressly recognized (171 F. 2d, p. 467) that "a provision exempting United States bonds from taxation as to principal and interest, *without more*, relates exclusively to direct taxation of them as property". (Original italics.)[6]

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only tax to which these bonds would be susceptible would be the income tax" (p. 1878); and Senator Corbett, that "The only advantage that they give this bond is by freeing it from that income tax" (p. 1879).

[6] By Section 604 of the Revenue Act of 1951, c. 521, 65 Stat. 452, Congress reversed *Jandorf* and provided for the inclusion of federal bonds in the taxable estates of non-

Petitioners also challenge *Murdock* because it was decided upon the basis of a distinction between direct and indirect taxes. (Pet. 12.) But the statutory exemption, by its express language, applies only to all taxes on *the bonds*. The justification for the distinction is thus implicit in the statute, which, like all exemption statutes, is to be strictly construed.

The distinction, moreover, is a basic one to which this Court has steadily adhered. Thus, a tax, other than a direct tax on property, may be measured by taking into account property which is itself tax-exempt. *United States* v. *City of Detroit*, 355 U.S. 466, 471; *United States Trust Co.* v. *Helvering*, 307 U.S. 57. The *Murdock* principle supports the constitutionality of the federal estate tax (*Knowlton* v. *Moore*, 178 U.S. 41; *New York Trust Co.* v. *Eisner*, 256 U.S. 345) and permits a state to impose an inheritance tax measured by the value of federal bonds included in the estate, even though a state is constitutionally prohibited from imposing a tax on the bonds themselves and even though federal statute makes the bonds exempt from any form of state taxation (*Plummer* v. *Coler*, 178 U.S. 115). And see *Pacific Co.* v. *Johnson*, 285 U.S. 480, holding that the tax exemption for municipal bonds granted by the California Constitution was not impaired by a privilege tax measured by the net income from the tax-exempt municipal bonds.

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resident aliens, on the ground that such "obligations * * * should be subject to the principle of *Murdock* v. *Ward* and *Plummer* v. *Coler*". H. Rep. No. 586, 82d Cong., 1st Sess., p. 139 (1951-2 Cum. Bull. 357, 457); S. Rep. No. 781, 82d Cong., 1st Sess., p. 86 (1951-2 Cum. Bull. 458, 519-520).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JUNE, 1959

APPENDIX

Act of August 5, 1909, c. 6, 36 Stat. 11:

> Sec. 39. That the Secretary of the Treasury is hereby authorized to borrow on the credit of the United States from time to time, as the proceeds may be required to defray expenditures on account of the Panama Canal and to reimburse the Treasury for such expenditures already made and not covered by previous issues of bonds, the sum of two hundred and ninety million five hundred and sixty-nine thousand dollars (which sum together with the eighty-four million six hundred and thirty-one thousand nine hundred dollars already borrowed upon issues of two per cent bonds under section eight of the Act of June twenty-eighth, nineteen hundred and two, equals the estimate of the Isthmian Canal Commission to cover the entire cost of the Canal from its inception to its completion), and to prepare and issue therefor coupon or registered bonds of the United States in such form as he may prescribe, and in denominations of one hundred dollars, five hundred dollars, and one thousand dollars, payable fifty years from the date of issue, and bearing interest payable quarterly in gold coin at a rate not exceeding three per centum per annum; and the bonds herein authorized shall be exempt from all taxes or duties of the United States, as well as from taxation in any form by or under State, municipal, or local authority: * * *.

Act of February 4, 1910, c. 25, 36 Stat. 192:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That any bonds and certifi-

cates of indebtedness of the United States hereafter issued shall be payable, principal and interest, in United States gold coin of the present standard of value; and that such bonds may be issued in such denominations as may be prescribed by the Secretary of the Treasury.

Sec. 2. That any certificates of indebtedness hereafter issued shall be exempt from all taxes or duties of the United States, as well as from taxation in any form by or under state, municipal, or local authority; and that a sum not exceeding one-tenth of one per centum of the amount of any certificates of indebtedness issued is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to pay the expenses of preparing, advertising, and issuing the same.

Sec. 3. That all Acts or parts of Acts inconsistent with the provisions of this Act are hereby repealed.

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